

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4149

*To be argued by
Stanley Israel*

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United States Court of Appeals
For the Second Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ACME WIRE WORKS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR ACME WIRE WORKS, INC.

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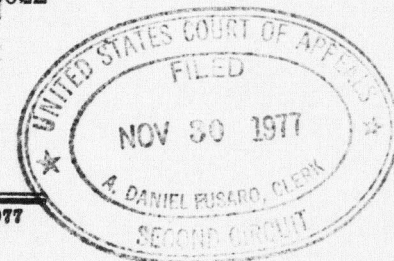


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Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR ACME WIRE WORKS, INC.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the findings of fact and conclusions of law contained in the decision and order of the National Labor Relations Board are properly supported by the evidence.

(2) Whether the decision and order of the National Labor Relations Board is reasonably designed to effectuate the policies of the National

Labor Relations Board Act as amended.

(3) Whether the decision and order of the National Labor Relations Board contains material and erroneous conclusions of law.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et. seq.) for enforcement of its order issued April 28, 1977, against Acme Wire Works Inc. ("Respondent").

For a number of years prior to June 30, 1975, Respondent had been a member of Wire Works Manufacturers Association ("Association"). Association, in turn, had been a multi-employer group, which inter alia, negotiated and entered into collective bargaining agreements with Local 455 covering the production and maintenance employees of the employer members of Association. The last such contract expired on June 30, 1975. On that day, all other collective bargaining agreements with Local 455 similarly expired. Employers with expiring contracts, other than those who were members of Association, fell into three categories. Some employers had been members of Allied Building Metal Industries, Inc., ("Allied"), which had been the major employer force in the industry at least until 1964 (37)*, and perhaps even up to 1976 (174). A second group

joined the Independent Association of Steel Fabricators, Inc. ("Independent"), which first bargained with Local 455 in June of 1975 (38). A third group of approximately sixty employers bargained separately and independently (37).

Prior to June 30, only two meetings took place between Local 455 and Association; one taking place on June 16 and the other either June 24 or June 26 (168). Local 455 was represented at these meetings by Mr. Matienzo, a business agent (as distinct from its President, Financial Secretary-Treasurer or Vice-President, all of whom are not business agents) (104, 105), and Mr. Hernandez, an employee in the industry who was sent by the President of Local 455 to accompany Matienzo (106). While Matienzo claimed that he had the authority to sit down and bargain, he admitted that he was not authorized to make any concessions without consulting with the Executive Board of Local 455 (113). At the first meeting, Association requested the attendance of the President of Local 455, Mr. Colavito, so that there might be meaningful negotiations (171). When Colavito failed to appear at the second meeting, Association expressed its regrets and stated that it felt that this was an indication that Local 455 was not meeting to "seriously talk about new contract" (172). When the request for the presence of Colavito was made to Matienzo, he responded that he would try to bring him down to the next meeting (173). In fact, Colavito did not appear until January of 1976 (137). Matienzo admitted that Local 455 was asked in

June to produce Colavito (136), did not deny that he was told by Association that he, Matienzo, had no authority to negotiate, and further that Association wanted someone present who had authority to negotiate a contract (137). He admitted stating that he could arrange for Colavito to be present "if you fellows come to the point where you are going to come to an agreement" (134), although it was never made clear how he expected the parties to come close to an agreement without the participation of a Union representative with authority. Matienzo's rationale for the desultory pre-strike meetings was his assertion that the Association itself was not seriously negotiating in these meetings; preferring to wait to see the outcome of the simultaneous negotiations between Local 455 and Allied (114, 115, 133). General Counsel's witness Bardy, however, vehemently contradicted the testimony of Matienzo in this regard; asserting just the opposite to be the case. He testified that Association was tired of being "the tail on the dog" (174), and that it felt that Local 455 did not bargain with it until January of 1976, after Allied had settled (174, 199). These two witnesses of General Counsel testified inconsistently in another major respect. Bardy testified that at the June 16th meeting, he was asked by Matienzo to produce a signed bargaining authorization from each and every member of the Association (168, 169). He further stated that he procured such authorizations from each such member employer with the exception of Respondent, and exhibited the same to

Local 455 at the second meeting (170). He never received such an authorization from Respondent (170, 171). Matienzo at first denied making the request (115, 116), but then testified that he could not recall the events in this regard (116, 117).

Substantively, the two meetings in June could in no sense be considered negotiations. In fact, the written demands of Local 455, such as they were, may not even have been presented to Association prior to the first meeting (120). To the extent the written document submitted by Local 455 may be deemed to be "demands", they were totally lacking in specificity and content.

Matienzo testified as follows with respect to wage increases (124, 125):

" Q. At the second meeting I believe you previously testified there was some discussion as to the Union's wage proposal.

A. Right.

Q. What was the Union's wage proposal?

A. Substantial increase.

Q. Prior to the time the strike began - -

JUDGE GIANNASI: Wait a minute. Are you reading? Is that word, or those words "substantial increase" appear in that document?

THE WITNESS: Yes.

Q. Prior to the time the strike began, did you advise the Association how much of an increase you meant by a "substantial increase"?

A. In specific terms, you mean?

Q. In specific terms.

A. No.

Q. When was the first time you advised the Association how much of a substantial increase in wages you wanted?

A. A meeting with the Association or prior to that. I don't ---

Q. At any time you advised the Association.

A. Well, I had given a stipulation sometime in the middle of July, with a net amount of increase on there.

Q. That was this document marked General Counsel's Exhibit No. 15; is this what you are referring to?

A. Yes.

Q. Now, that was the first indication of what the Union was looking for specifically in wages; is that right?

A. Yes.

Q. That was approximately two weeks after the strike began; is that right?

A. About that, yes. "

At the same time, Local 455 showed no reluctance to specify its wage demands to Allied (153).

In connection with the second major component of an economic settlement, Matienzo testified as follows with respect to increased contributions to the various fringe benefit funds (125-127):

"Q. Well, there are a variety of trust funds specified in the contract, are there not?

A. Yes, six or seven.

Q. Six or seven funds. Do you know what they are offhand, Mr. Matienzo?

A. I will see if I can recollect them. Pension, welfare, annuity, vacation, training fund, sick leave and severance pay.

Q. Those are separate funds?

A. Yes, each one is separate, yes.

Q. And under the old contract, that is the contract which is expired June 30th, the employers made contributions to these various funds?

A. Yes.

Q. In the negotiations was the Union looking for an increase in contributions to all of these funds?

A. No, not all of them.

Q. Which funds were they looking for an increase?

A. My best recollection, welfare, pension, vacation, annuity.

That is all I recollect.

Q. Prior to July 1, did you advise the Association that the Union was not looking for an increase in all the funds but only some of them?

A. Did I advise them?

Q. Yes.

A. Well, I advised them with this.

Q. Pardon?

A. Only advised them as far as the proposals.

Q. Would you turn to Section 26, please?

A. Yes, 26, 27, 28, 29, 30, 31.

Q. Those are the six funds, are they not?

A. Yes.

Q. Would you read Subdivision A out loud, please?

A. "There shall be an increased contribution by the companies to each of the trust funds."

Q. Well, it says to each of the trust funds?

A. That's right.

Q. Did you advise the Association that each only meant some but not all?

A. No.

Q. Did you discuss the increased contributions at either the first or second meetings in June?

A. In specific terms?

Q. Yes.

A. No, not specifically. "

In attempting to explain why Local 455 did not negotiate with Association the rate of increased contributions to these Funds, Matienzo initially testified that Allied traditionally set the pattern (128). He subsequently modified this testimony by stating that it is possible that there were times when Allied may not have set the pattern (129). Local 455 had not made a decision that Allied was to set the pattern in these negotiations (130), and that Local 455 was out to get "the best deal from whomever it could get it from" (131).

Matienzo testified as follows with respect to increased contributions to the Vacation Benefit Fund (122, 123):

"Q. In the negotiations for the contract which started July 1, the Union asked for an increase of those contributions, did it not?

A. Yes.

Q. Now, referring you to Section 16 of the General Counsel's Exhibit No. 13, which is the Union proposals, Subdivision E, would you please read that to yourself?

A. E?

Q. E.

A. Read it out?

Q. Read it to yourself, please, Mr. Matienzo. Now, what was the Union proposal with respect to the increased rate of contributions? Specifically, what amount was the Union now asking for?

A. Nothing specific.

Q. In fact, the amount is left blank, is it not, in the proposal?

A. That is correct.

Q. When did you first communicate to the employer, if at all, what was the increased amount the Union was seeking?

A. When did I communicate it?

Q. Yes.

A. Not until January.

Q. Not until January?

A. Yes.

Q. About seven months after the strike started?

A. That's right. "

Thus, on July 1st the strike began, although Local 455 had not as yet advised Association of its demands, had not produced a bargaining representative with authority and had not bargained on any item of consequence. This should be compared to the pre-strike posture of Local 455 with Allied.

In that bargaining situation, Colavito represented the Union (55) and specific wage and fringe benefit proposals were made and discussed prior to the strike (152, 153).

No meetings, much less negotiating sessions, were held between July 1, 1975, and January 13, 1976 (144). Nevertheless, Local 455 felt free to present Association with a proposed stipulation of settlement on a "take it or leave it basis" (175, 176). This stipulation (Gen. Couns. Exhibit #15; 272) provided inter alia that Association would accept the Fund revisions "negotiated in the Allied and Standard Independent contracts" and if a contract of a duration of longer than one year were negotiated in the industry, then the Association "shall adopt and accept the changes made for the period after the first 1st year". Thus in lieu of negotiating, Local 455 asked Association to accept all of the terms and conditions (after the first year) it might negotiate with undefined third parties. Even with respect to the first year, Local 455 asked Association to accept either the Allied or Standard Independent settlement with respect to revised contributions to the various funds.

The foregoing should be contrasted with the negotiations conducted by Colavito on behalf of Local 455 with Allied and Independent. Four or five sessions were had with Allied in June of 1975, and four were had with Independent (55, 56). Local 455 met with Allied once in July (56), once in August (56), a couple of times in September (57), a couple of times in

October (57), and once in December (57). A representative of the International Union participated in the September and October negotiations (57). The Federal Mediation Service was involved (58) and a December offer was accepted in a mail referendum in January 1976 (58). Similarly, Local 455 met once with Independent in August and perhaps three additional times during the balance of the year (56, 57).

Parenthetically, it should be noted that whether the above referred to stipulation was presented by Local 455 in early July (140) or late June (203) is not significant. What is significant is the fact that it was presented by Local 455 to Association in the course of its attempting to procure a new labor agreement.

On July 15, 1975, after the strike had commenced and after Association had received the proposed stipulation which sought to tie the Association to a contract not then in existence and to be negotiated with others, Respondent expressed despair over the situation and stated that Association should be prepared that he would not be part of the negotiation with Local 455 (178, 179, 180). No written resignation was submitted at that time by Respondent, but Mr. Bardy testified that he knows of no rules, regulations, by-laws or other documents which required such resignation to be in writing (182). It is clear that Mr. Bardy construed the statement of Respondent as either a resignation or intention to resign, since without

any further discussions he sought to have the matter reduced to writing on January 12, 1976 (183). Whether the resignation was procured on January 12th, as Mr. Bardy repeatedly testified (185 et. seq.) or on January 16th as he indicated on a copy of the resignation (Gen. Couns. Exhibit #8; 266), is not of great significance. It is submitted, however, that the preponderance of the evidence supports a January 12 finding. Colavito testified that the subject of Respondent's participation first came up at the conclusion of the January 19 meeting, at which time he was shown the resignation and had Mr. Bardy insert the alleged date of receipt (44, 45). Matienzo, on the other hand, testified that the subject came up at the January 13 meeting and at that meeting Colavito asked Association to look further into the matter and report back. Matienzo testified that Association agreed and furnished and dated the resignation at the next meeting on January 19 (91-95). Mr. Bardy corroborated Matienzo to the extent of stating that the subject came up on January 13, a copy of the resignation was handed to Local 455 on January 19, and the January 16 date was inserted on January 19 (185 et. seq.). If as Messrs. Matienzo and Bardy testified, the subject first came up on January 13, it is reasonable to assume that the letter of resignation was first procured on January 12, and the 16th date is simply an error (185-186). What is not at all in dispute is that Respondent refused to grant a written bargaining authorization (170, 171), it expressed an intention to resign as

early as July 1975 (179, 180), it participated in no Association meetings after July 15, 1975 (195), it did not participate in either the January 13 or 19 negotiating session (195), Mr. Bardy advised Matienzo by phone prior to the January 13th session of Respondent's resignation (196, 217), and under any circumstances Respondent resigned before Association believed it "had a very good chance at reaching a contract on the 19th" (211, 212).

Respondent also became a party to a collective bargaining agreement with Local 810 I. B. T. dated January 1, 1976 ("Local 810") (Gen. Couns. Exhibit 17; 274) . The record is barren of testimony as to the circumstances surrounding the entry into the agreement.

The following is the state of the record with respect to the four pre-strike employees of Respondent who were members of Local 455:

Mr. Daniel Dougherty returned to work during the strike (100, 147, 148).

Matienzo heard that Manuel Diaz similarly returned to work during the strike (100, 101, 147, 148).

Martin Hammel could not return to work inasmuch as he was suffering from cancer (148, 157, 159).

Frank Paradise has not been seen since the strike (149), was not seen picketing Respondent during the strike (149), has not been spoken to since March 1976 (159), and has a new job (159).

ARGUMENT

I

THE BOARD ERRED IN FINDING THAT THE RESPONDENT HAD NOT EFFECTED A TIMELY WITHDRAWAL FROM GROUP BARGAINING

A. WITHDRAWAL WAS JUSTIFIED ON THE BASIS OF "SURFACE BARGAINING" ON THE PART OF LOCAL 455

As set forth in the Statement of the Case, Local 455 failed to submit the specifics of its contractual demands, was represented by "negotiators" without authority, refused to even discuss with Association any substantive matters beyond a first year settlement, requested that Association agree to be bound by the Allied first year settlement on the Funds, requested that Association agree to be bound by settlements reached with others with respect to substantive changes after the first year, presented a stipulation to Association on a "take it or leave it basis", and did not meet with Association for in excess of six months.

It has been consistently held that an employer is relieved of its duty to bargain where a Union itself bargains in bad faith, Superior Engraving Co. v. N. L. R. B., 183 F. 2d 783 (C. A. 7, 1950); American Cyanamid Co., 129 NLRB 683 (1960); Otto Klein d/b/a Artistic Permanent Wave Co., 172 NLRB No. 223 (1968). In the latter case, the Board held that the evidence failed to establish that an employer had unlawfully refused to bargain with a Union

and then unlawfully withdrawn recognition, in view of the fact that the Union inter alia, had adopted a "take it or leave it" attitude on a number of issues and had refused to explore the employer's counterproposals. In Solar Aircraft Co., 109 NLRB 130 (1954), the Board held that the Union's failure to give an employer a formal answer to a proposed plan for recalling strikers, after polling Union members on the plan, was grounds for rejecting the contention that the employer refused to bargain on the subject of the recall of the strikers. Attention is also called to Thompsons Brothers Coal Company Inc., 192 NLRB No. 5, (1971), in which implicit in the decision of the Board was the principle that if Union negotiators have no authority to agree on the terms of a bargainable matter other than on the basis of a contract or negotiation with a third party, a Union refusal to bargain is involved, and the same would constitute a defense to an 8(a) (5) charge. For a decision much in the same vein, see Standard Oil Co., 137 NLRB 690 (1962), enf'd. 322 F.2d 40 (C.A. 6, 1965), in which the Board held that a Union unlawfully refused to sign contracts covering the employer's bargaining units, when the delay in signing was unrelated to any dissatisfaction in contract terms, but was based upon the Union's decision to approve no agreement with the employer until negotiations were satisfactorily concluded by another local at another of the employer's plants.

In the instant case, Local 455, although meeting with Association on two pre-strike occasions, was not engaged in good faith bargaining.

Good faith bargaining presupposes the making of demands, the give and take of negotiations based on the bargaining, the absence of a "take it or leave it" approach, and an open minded approach. In the instant case, specifics of demands were absent, negotiations were only "surface" in content, and the Association was faced with a "take it or leave it" approach with respect to both contributions to the Funds and the substantive aspects of a second and third year settlement. Association was given no opportunity to negotiate in these vital areas. The sole options granted to it by Local 455 were to sign a stipulation agreeing to be bound by contracts negotiated by others, or to continue on strike. In effect, Association was denied the opportunity to bargain concerning vital aspects of its own contract. The Board itself has previously ruled that such conduct is violative of the Act, Plasterers & Cement Masons, Local 2, 149 NLRB 1264 (1964).

In the two June meetings, Local 455 engaged in nothing more than surface bargaining. These meetings were not carried on in good faith, with an open mind and with a sincere purpose to reach an agreement, United States Gypsum Company, 94 NLRB No. 27 (1951). The Board has repeatedly held that a party may not claim that its bargaining obligation is satisfied by merely meeting with the other side and discussing contract proposals. See for example, Southern Tours Inc., 167 NLRB 363 (1968), enf'd. 401 F.2d 624 (C.A.5, 1968).

After the commencement of the strike, Local 455 did not even continue with the pre-strike bargaining pretense. Its sole contact with Association was for the purpose of offering to it the stipulation, which by its very terms precludes bargaining.

The Board rejected the contention that Local 455 had not engaged in good faith bargaining. Its conclusion is premised on its finding that Local 455 did request generally increased benefits before the strike, did ask for a 10% wage increase after the inception of the strike, and ultimately and by virtue of waiting, Association was able to obtain an agreement on the subcontracting of panels (251).

In fact, the request for increased benefits coupled with a refusal to specify the amount of increases or the benefits which were to be increased, is tantamount to "meeting" but not "bargaining"; a practice (as heretofore stated) violative of the Act.

The request for a 10% wage increase was contained in the proposed stipulation (Gen. Couns. Exhibit #15 272) given to Respondent on a "take it or leave it" basis, which itself included provisions requiring Association to accept substantive terms of an agreement to be negotiated with unrelated third parties; a practice likewise violative of the Act.

Lastly, it is submitted that the ultimate agreement on the relatively minor issue of subcontracting of one particular item, does not bear in the least on the issue of whether Local 455 had theretofore bargained in good faith.

The findings and conclusions of the Board in this regard are clearly erroneous. Local 455 not having bargained with Association in good faith, Respondent in turn was relieved of its duty to bargain and hence could withdraw from group bargaining. The decision of the Board does not deny the proposition that surface bargaining on the part of Local 455 would excuse what would otherwise be considered an untimely withdrawal. Rather it assumes the proposition arguendo (251), and then concludes (i) that there was no surface bargaining and (ii) that even if surface bargaining existed, no charges were filed by Association or Respondent with respect to the same, and therefore it cannot be raised as a defense. As heretofore stated, the first proposition is not in accord with the evidence. The second proposition is based on its prior holdings in Roman Stone Construction Company, 153 NLRB 659 (1965) and North Bros. Ford Inc., 220 NLRB No. 154 (1975). Neither of those two Board decisions allows however for the holding of the United States Supreme Court in Local Lodge No. 1424 IAM (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960). In that case, the Supreme Court held that Section 10(b) of the Act does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. Earlier events may be utilized to shed light on the character of matters occurring within the limitations period; although they may not be utilized to convert otherwise lawful conduct into illegal acts. In the

instant matter Respondent has not filed charges or sought to resurrect time barred unfair labor practice charges against Local 455. The conduct of Local 455 is utilized only to shed light on those matters admittedly within the limitations period. Under the holding in Bryan, the otherwise time barred conduct of Local 455 is admissible for the purpose of explaining the actions of Respondent.

Under any circumstances, all Local 455 conduct from August 20, 1975 on, is admittedly a proper subject for consideration (the charge herein having been filed on February 20, 1976). During that period of time, Local 455 maintained its posture of being willing to settle only on the basis of the previously discussed stipulation; one that was clearly violative of its bargaining obligations under the Act. As such, even if evidence as to the June meetings is deemed to be time barred, evidence as to the stipulation is not and it itself is the most striking evidence of Local 455's failure and refusal to engage in good faith bargaining.

**B. WITHDRAWAL WAS JUSTIFIED ON THE
BASIS OF AN IMPASSE IN BARGAINING
BETWEEN THE ASSOCIATION AND LOCAL 455**

Assuming arguendo either the existence of good faith bargaining on the part of Local 455 or a legal impediment to Respondent's right to assert surface bargaining as a defense, it is nevertheless clear that an impasse was reached shortly after the commencement of the strike. No new meet-

ings were scheduled, nor even contemplated. Local 455 submitted a stipulation of settlement to Association which precluded any further bargaining, but rather sought to bind Association to negotiations and settlements to which it was not and could not be a party. Association rejected this approach. No meetings, much less negotiations were held for a period in excess of six months. During this period of time, the strike dragged on without even the slightest prospect of settlement. It is submitted that sometime during the summer of 1975, the total inaction ripened into a genuine impasse.

The Board however concluded that no impasse existed. Its determination was based on its belief that no single over-riding issue separated the parties, both parties were satisfied to await the outcome of the Allied negotiations, and ultimately the Allied settlement influenced the final settlement with Association, (251). This analysis is both legally and factually incorrect. As stated in Taft Broadcasting Company, 163 NLRB 475 (1967), the judgment of whether an impasse exists is partially determined by the importance of the issue or issues as to which there is disagreement. There need be no single over-riding issue. In the instant matter, there was no single issue, since there was no agreement on any issue; major or minor. As opposed to a negotiation where only a single issue separated the parties, here all issues separated the parties. If as indicated in Taft, one major unresolved ^{issue} might be indicative of impasse, certainly the absence of any resolved issue is clearly indicative of the same. Secondly, the conclusion

of the Board that the parties were satisfied to await the outcome of the Allied negotiations, borders on the "incredible" and should not be adopted. Implicit in this conclusion is the further conclusion that the Association was satisfied with a strike of over six months duration and would continue to be satisfied with such a strike for an indefinite period, or at least until a settlement had been effectuated with Allied. Clearly, this Court should reject the conclusion that a marginal industry was readily satisfied to accept a strike of such prolonged duration. A strike of such magnitude is and obviously was unacceptable and when viewed in the context of a complete absence of negotiations (much less agreement on any one or more issues), is surely indicative of an impasse.

While the Courts will normally defer to the Board in matters such as this, they should not abdicate their responsibility to determine whether the record as a whole contains substantial evidence in support of a finding that no impasse existed. This approach was adopted by the 5th Circuit in NLRB v. Hi-Way Billboards Inc., 473 F. 2d 649 (1973). In that case, the Court rejected the conclusion of the Board that an impasse had not existed and determined for itself that a genuine impasse had in fact existed.

Nor is the fact that a settlement was ultimately reached on January 19, 1976, indicative of the fact that an impasse had not been reached on any prior date, NLRB v. Hi-Way Billboards Inc., supra; NLRB v. Beck Engraving Co. Inc., 522 F. 2d 475 (C.A. 3, 1975).

Lastly, the Board concluded that " Board law is quite clear that impasse alone is no excuse for untimely withdrawal from the multi-employer bargaining obligation. Bill Cook Buick, Inc., 224 NLRB No. 154." (251). The Board does not assert in its brief to this Court, that such is the position of this or any of the other Circuits. In fact, the 3rd, 5th, 8th and 9th Circuits have rejected this proposition. The 3rd Circuit in NLRB v. Bear Engraving Co. Inc., (supra), at page 483, stated as follows:

"We therefore join the Ninth, Fifth and Eighth Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining unit, NLRB v. Associated Shower Door Co. Inc., 512 F.2d 230 at 232 (9th Cir. 1975), pet. for cert. filed 44 U.S.L.W. 3062 (U.S. July 23, 1975) (No. 75 - 127); NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181 at 183-184 (5th Cir.1974); Fairmont Foods Co. v. NLRB, supra at 1172-1173 & 1174, n. 1."

The rationale of the four Circuits is that the Board having committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, The Evening News Association, 154 NLRB 1494 (1965), enf'd. Sub nom Detroit Newspaper Publishers Association v. NLRB, 372 F.2d 569, 572 (C.A. 6, 1967), it must in fact afford employers equal withdrawal rights. Since the Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with the employers remaining in the multiple unit, Pacific Coast

Association of Pulp & Paper Manufacturers, 163 NLRB 892 (1967), it must permit similar withdrawal by any one or more of the employers. The Board however may argue to this Court that this rule does not apply to this case, since Local 455 did not actually attempt to negotiate individual interim agreements during the bargaining. This contention was made in NLRB v. Beck Engraving Co. Inc., (supra). The Court rejected the contention, stating as follows:

"The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e. g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that, to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party."

It should also be noted that the decisions of this Court in Sheridan Creations, Inc., 357 F.2d 245 (1966), cert. den. 385 U.S. 1005 (1966) and NLRB v. The John J. Corbett Press, 401 F.2d 673 (1968), do not in any way represent rules in conflict with those established in the four Circuits. Sheridan did not deal with the issue of impasse, and the Court in Corbett

specifically determined that at no time had an impasse been reached.

C. WITHDRAWAL WAS JUSTIFIED ON
THE BASIS OF THE PRESENCE OF
"UNUSUAL CIRCUMSTANCES"

The Board in Hi-Way Billboards Inc., 206 NLRB 22, 23 (1973),
rev'd on other grounds, 500 F. 2d 181 (C.A. 5, 1974), stated as follows:

"In cases after Retail Associates, the Board has limited application of the term "unusual circumstances" to those cases in which the withdrawing employer has been faced with dire economic circumstances, i. e., circumstances in which the very existence of the employer as a viable business entity has ceased or is about to cease. Thus, the Board has held that an employer may withdraw from a multi-employer bargaining association after negotiations with the union have begun where the employer is subject to extreme economic difficulties which result in an arrangement under the bankruptcy laws, where the employer is faced with the imminent prospect of such adverse economic conditions as would require it to close its plant, or where the employer is faced with the prospect of being forced out of business for lack of qualified employees to do the job and the union refuses to assist the employer by providing replacements for the employees he lost. "

There can be no doubt that the industry of which Respondent and the employer members of Association are a part (as well as the employers themselves), are and have been confronted for some time with dire economic circumstances imperilling their very existence; see for example Gen. Couns. Exhibit # 14 (269-271). The picture presented is of a deeply depressed industry, with minimal work, minimal employment opportunities and then

a strike of seemingly interminable duration. This coupled with an obvious antipathy of Local 455 towards bargaining with Association, the actual lack of meaningful bargaining (both qualitatively and quantitatively) with Association, Local 455's refusal to give specifics of its economic demands to Association, Local 455's refusal to bargain either on the question of contributions to the various Funds or the substantive aspects of a second and third year settlement, and its "take it or leave it" offer of the stipulation, when viewed in any combination or in their totality, present a clear and convincing case of most unusual circumstances. It is submitted that the illustrations cited in Hi-Way Boards (supra) are far less drastic or unusual than in the instant case. In the instant case, the very existence of Respondent was jeopardized by its remaining as part of the multi-employer group, inasmuch as there was no reasonable possibility (much less probability) that the strike could be settled within a reasonable period of time through that form of collective bargaining. Absent a likelihood of such settlement, and in the presence of the otherwise dire economic picture, survival largely depended on being able to effectuate a labor settlement on an individual basis. It should be borne in mind at this point, that withdrawal did not automatically mean bargaining with a labor organization other than Local 455. It only meant that Respondent would not be locked into non-meaningful bargaining with Local 455 through Association. It might however very well result

in a separately negotiated agreement with Local 455. If withdrawal was justified, and the Respondent submits that it was, then the follow-up question is what was the individual bargaining obligation of Respondent (POINT II herein).

The Board rejected the foregoing as constituting "unusual circumstances". Its rejection was based on the fact that other members of the multi-employer unit, similarly situated in a depressed industry, remained in the unit. The simple answer is that Respondent's survival was not dependent upon decisions made by others as to the others best means to survival. Indeed the record does not even indicate whether the other members of the unit were able to remain in business after the strike and after entering into the Agreement with Local 455. The Board's view of what constitutes "unusual circumstances" was unduly narrow and should not be adopted by this Court, NLRB v. Siebler Heating and Air Conditioning, Inc. (C.A. 8, No. 76-2125, October 11, 1977).

**D. RESPONDENT'S TIMELY WITHDRAWAL
WAS EFFECTIVELY COMMUNICATED
TO LOCAL 455.**

The record supports the conclusion that notice of the withdrawal was given on January 12, 1976, prior to the resumption of meetings with Local 455 (196, 217) and then at the January 13 meeting. The Board erred in finding that the notice was first given on January 19, the date of the second meeting (250). If its conclusion was based on the actual testimony given, then it overlooked the uncontroverted testimony as to the January 12 communication, and its own finding that Local 455 was told

on January 13 that Respondent "was finished with us" (248). If its conclusion is based on its total disbelief of the testimony of Bardy, whether or not controverted, it is subject to different challenge.

In part, the disbelief of Bardy was based on the finding that Colavito and Matienzo gave mutually corroborative testimony with respect to notice of the Respondent's resignation (248). In fact, their testimony was inconsistent; see page 13 of this Brief. It is at a minimum absolutely clear that the notice was given no later than January 13, 1976, at the first resumed meeting with Local 455 (91-95, 185 et. seq.) and given prior to the time a settlement was anticipated, much less consummated (211, 212). As such, Respondent is deemed to have unequivocally manifested its desire to withdraw from group bargaining and to have effectively communicated the same to Local 455. Imperial Outdoor Advertising, 192 NLRB No. 183 (1971). It is not significant that the notice was given to Local 455 shortly before or at the inception of the resumption of the meetings in January 1976, rather than shortly after the expression of intention to withdraw in July of 1975, or the date of the resignation in August of 1975; this for the reason that there were no meetings nor negotiations in the interim period and Local 455 took no steps, nor changed any position, based on an assumption that Respondent continued as a member of the group. Nor is the date of the receipt by Local 455 of the

August 11, 1975, written resignation significant (266) in view of the oral communication on January 12 and 13.

II

HAVING EFFECTED A TIMELY WITHDRAWAL
FROM GROUP BARGAINING, RESPONDENT IS
NOT BOUND BY ANY AGREEMENT ENTERED
INTO BETWEEN LOCAL 455 AND ASSOCIATION.

If, in fact, Respondent effected a timely withdrawal, then its bargaining rights and obligations are to be determined on a single employer basis as the facts existed with respect to it. General Counsel, having challenged the Local 810 contract (Gen. Couns. Exhibit #17; 272) had the burden of establishing its illegality.

"The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act * * *". Section 101.10(b), NLRB Statements of Procedure - Series 8.

General Counsel did not meet his burden of establishing the continuing representative status of Local 455 amongst the employees of Respondent. If anything, the record shows little or no interest of the employees in Local 455 as a bargaining representative. Two of the four pre-strike employees worked during the strike, one was too ill to return, and the last never picketed, has not been seen since the strike and has found a new job. Accordingly, there is nothing in the record which

justifies setting aside the contract entered into with Local 810. If General Counsel sought to establish that Local 810 did not represent an uncoerced majority of Respondent's employees at the time it entered into a contract with Local 810 (but that Local 455 did so represent the employees), then it has failed to meet its burden on both counts.

Assuming arguendo, however, the existence of a continuing presumption of Local 455 representation of Respondent's employees (even after a timely withdrawal from group bargaining), then the maximum appropriate remedy would be a voiding of the Local 810 contract combined with a direction to Respondent to bargain with Local 455 as the representative of its employees. Assuming timely withdrawal, under no circumstances could a voiding of the Local 810 contract also be combined with a direction to Respondent to execute the contract negotiated by Local 455 and the Association. Timely withdrawal frees Respondent completely from any contract negotiated in the multi-employer bargaining and this fact is in no way disturbed by a conclusion that Respondent may have unlawfully negotiated a contract with another, not the legal bargaining representative of its employees.

III

RESPONDENT WAS NOT REQUIRED TO REINSTATE
ANY OF ITS EMPLOYEES TO THEIR FORMER
POSITIONS OF EMPLOYMENT.

For all of the reasons heretofore stated, it is submitted that the

Board erred in concluding that the economic strike was converted into an unfair labor practices strike. But assuming arguendo the correctness of this conclusion, a requirement of reinstatement is nevertheless improper.

With respect to the letter of March 29 (Gen. Couns. Exhibit #11;268), Mr. Colavito testified that he did not know the names of the employees he was referring to (52), how many were involved (52), whether any may have been working for Respondent at that very moment (52) or whether any may have already left the industry (53). He could not identify employees Dougherty and Diaz and therefore did not know that they had returned to work for Respondent during the strike. He did not know employee Hammel and was therefore unaware that he could not return to work because of a serious illness. He did not know employee Paradise and was therefore not aware of the facts concerning his situation as set forth on page 13 of this Brief.

The Board, except where the offer would be a futility, has conditioned otherwise appropriate reinstatement, upon an unconditional and bona fide offer to return, Certified Casting & Engineering Inc., 145 NLRB 572 (1963); Scott d. b. a. Atlantic Daily World 192 NLRB No. 30 (1971); National Shirt Shops of Florida, 105 NLRB 116 (1953). In the instant case, the offer (if it may be called that) was neither unconditional nor

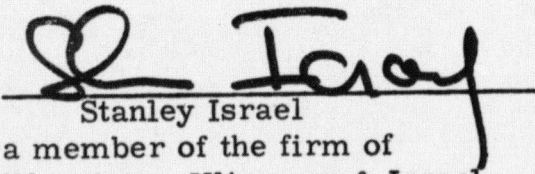
bona fide. At best it was a pro forma statement without knowledge of any of the circumstances of the particular employees. The offer cannot be considered bona fide or even relevant as to Diaz and Dougherty, who returned to work for Respondent without the intervention of Local 455. It cannot be considered bona fide as to Hammel who was unable to work at the time (March), when the letter was sent. If it be considered bona fide, then it must be viewed as being conditioned upon his return to good health. It cannot be considered bona fide as to Paradise whose status was unknown to Local 455.

In view of the foregoing, and assuming arguendo that the burden of General Counsel had been met in all other regards, no violation of the Act can be predicated upon any failure to reinstate after March 29. The statement by the Administrative Law Judge at page 10 of his decision (253), adopted by the Board, that he is convinced that Matienzo had sufficient knowledge of the desires of the employees to return to work so as to make the Union's offer a legitimate one, is truly remarkable. With the exception of a cursory conversation with Paradise, Matienzo had not spoken to any of the other employees and his knowledge of the other three employees was that two were already working and one was unable to work because of illness. The "conviction" of the Administrative Law Judge is simply not sufficient where the evidence is directly to the contrary.

Lastly, no violations can be found if, in fact, Respondent was under no duty to recognize the contract negotiated between Local 455 and Association. Since even the pro forma offer of reinstatement was predicated upon Respondent's acceptance of the agreement between Local 455 and Association, only a conditional offer of reinstatement would have been involved. Even assuming arguendo that Respondent had not been free to recognize and then negotiate a contract with Local 810, the employees would then be deemed to have maintained their status as economic strikers and the offer deemed to be a conditional one only. As such, Respondent had no legal obligation to honor the request.

CONCLUSION

For the foregoing reasons, this Court should deny enforcement of the order of the Board.


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